

# MISSOURI COURT OF APPEALS WESTERN DISTRICT

**DEVELOPERS SURETY AND INDEMNITY COMPANY,  
vs.  
WOODS OF SOMERSET, LLC., ET AL.,**

**RESPONDENT  
  
APPELLANT**

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DOCKET NUMBER WD77792  
Date: March 3, 2015

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Appeal from:

The Circuit Court of Jackson County, Missouri  
The Honorable James F. Kanatzar, Judge

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Appellate Judges:

Division Two: Anthony Rex Gabbert, P.J., Joseph M. Ellis, J. and Karen King Mitchell, J.

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Attorneys:

Shane C. Mecham, for Respondent

Mark H. Epstein, for Appellant

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DEVELOPERS SURETY AND INDEMNITY COMPANY, RESPONDENT**

**v.**

**WOODS OF SOMERSET, LLC, ET AL., APPELLANT**

WD77792

Jackson County, Missouri

Before Division Two Judges: Anthony Rex Gabbert, P.J., Joseph M. Ellis, J. and Karen King Mitchell, J.

This case arises from claims brought by Developers Surety and Indemnity Company ("DSI") against Daniel Waldberg, Brenda Waldberg, Barney Ashner, Marlene Ashner, and Woods of Somerset, LLC ("Appellants") related to an indemnity agreement Appellants executed in order to obtain a payment bond from DSI for the development of a subdivision. In a prior appeal to this Court, we reversed the judgment of the trial court, held that the indemnity agreement at issue was valid and enforceable, and remanded to the trial court for entry of judgment in favor of DSI. ***Woods of Somerset, LLC v. Developers Sur. & Indem. Co.***, 422 S.W.3d 330, 336 (Mo. App. W.D. 2013). On remand, following the entry of a judgment in favor of DSI that did not specify any relief and a subsequent motion to amend that judgment to award relief, the trial court entered its Second Amended Judgment in favor of DSI and against Appellants, awarding \$57,000.00 in damages and \$144,000.00 in attorneys' fees and costs.

**AFFIRMED AND REMANDED TO AWARD ATTORNEY'S FEES INCURRED ON APPEAL.**

**Division Two holds:**

(1) A motion to amend, if filed within thirty days after judgment is entered, is an authorized after-trial motion that extends the circuit court's control over its judgment for up to 90 days from the date the motion was filed. Under Rule 78.04, it does not matter how long after trial the trial court enters judgment, merely that the motion to amend be filed within thirty days of the entry of the judgment.

(2) Even assuming, *arguendo*, that the instruction for entry of judgment in this Court's prior opinion rendered our mandate a specific one, the phrase "for entry of judgment in favor of DSI," contained in this Court's prior opinion, can only be understood in the context of the claims brought and the relief requested in DSI's petition in the underlying action. In our prior opinion, we generally noted that

DSI's petition asserted claims for indemnity and specific performance, and we subsequently held that DSI was entitled to judgment in its favor. *Id.* at 333, 336. Thus, our opinion clearly contemplated the entry of a judgment in favor of DSI awarding some amount of indemnity and/or declaring rights and ordering specific performance of the indemnity agreement.

(3) Whether the trial court's judgment exceeded the scope of indemnity and/or specific performance requested in the petition cannot be assessed by this Court on appeal because a copy of the petition has not been included in the record on appeal for our review. Accordingly, this Court cannot determine whether DSI's petition raised claims that would allow for reimbursement of attorney's fees and/or a declaration that DSI is entitled to indemnity for attorney's fees from Appellants. Likewise, we cannot know if DSI requested relief that would include indemnification for settlement costs and expenses and/or a declaration that DSI is entitled to indemnification by Appellants for such costs.

(4) The record before this Court does not establish that the trial court deviated from or acted contrary to this Court's instructions. Where necessary materials are omitted from the record on appeal, the appellate court will assume that the omitted items were unfavorable to the appellant and favorable to the respondent. Accordingly, in the case at bar, this Court must assume that the relief granted by the trial court fell within the scope of the relief requested in DSI's petition.

(5) In asserting that the trial court erred in including in its judgment attorney's fees incurred by DSI in bringing the original appeal because DSI did not file a Rule XXIX motion for such fees with this Court prior to submission of that appeal and because our opinion did not specifically award such fees, Appellants fail to even establish that the trial court awarded any attorney's fees for appellate work, let alone that it erroneously did so.

(6) Pursuant to Local Rule XXIX, Respondent has moved for an award of attorney fees and expenses incurred in this appeal. In accordance with the indemnity agreement between the parties, Respondent is entitled to its attorney's fees and expenses on appeal. Consequently, Respondent's motion is granted.

(7) Because the trial court is better equipped to hear evidence and argument on the issue of attorney's fees incurred on appeal, the cause is remanded to the trial court for the purpose of conducting a hearing to determine and award Respondent's reasonable fees and expenses incurred in connection with this appeal.